In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, No. 96-98 and No. 98-147

Comments of AT&T Corp.

EXECUTIVE SUMMARY

In New York, the promise of the 1996 Act is beginning to be fulfilled. Millions of residential and business customers have switched their local service to competitive carriers. These customers are starting to enjoy the benefits of price competition and product diversity that only competition can bring. New York stands out, in part, because its commission is the first to make unbundled network elements available to competitors both at reasonable prices and through workable operations support systems. But New York is a leader in another key respect as well: it is *also* among the states with the highest levels of facilities-investment, not just by AT&T but by incumbents as well. Market experience in New York demonstrates conclusively that making unbundled network elements ("UNEs") available to competitors does *not* discourage facilities-based competition, as the incumbent local companies would have the Commission believe. In fact, access to UNEs is essential to promote facilities-based competition.

In most other states, however, consumers and most businesses still have no choice but to accept local phone service from the incumbent monopoly carrier. Dozens of would-be competitors that borrowed heavily to buy and deploy switches and fiber are now bankrupt. Remaining competitors are struggling to survive. Their switches and other local facilities are underutilized or idle, and they still lack the practical ability to use the incumbent's network elements, either because UNE rates are too high, because operational support from the

incumbent is inadequate, or both. Absent changes in these conditions, the prospects for further facilities-investment in local service for these states are dim, to say the least.

This Commission, then, is at a crossroads. Will the Commission propel the rest of the country toward the local competition and facilities-investment that New York has shown will result from vigorous enforcement of the 1996 Act? Or will it perpetuate the capture of consumers by stagnant local monopolies for the foreseeable future, by relaxing its UNE rules in hopes that some new technology to provide local service might emerge in the future?

The Commission will make that pivotal choice here. The core question posed in this NPRM is whether the availability of unbundled network elements helps or hinders the development of local facilities-based competition. The market experience of the last 6 years, and indeed the last 30 years, answers that question loud and clear: unfettered access to UNEs is crucial to promote both local competition and the investment in facilities necessary to provide both traditional and advanced local services. That was clearly the model that led, over three decades, to today's highly competitive long distance market. And it is the model that, if fully and zealously enforced now, will create competitive local service markets as well.

The marketplace evidence unequivocally refutes the ILECs' monopoly-serving claims. The ILECs argue that UNEs are a needless "crutch," and that their availability deters both CLECs and ILECs from investing in new facilities. "Restrict access to UNEs," the ILECs confidently assert, "and competitors will then build their own facilities to compete with us. But fail to restrict UNEs," they add, "and no one, including us, will invest in new facilities." The ILECs would thus have the Commission believe that restricting CLEC access to UNEs is just a form of economic "tough love" that will transform the CLECs into stronger competitors.

Fortunately for consumers, the absurdity of the ILECs' self-serving prescription is now starkly apparent. It is counterintuitive to suppose that the ILECs genuinely wish to make it easier for their competitors to lure away long-captive local customers. It is far more reasonable (and consistent with their past behavior) to suppose that the ILECs would prefer to handcuff their competitors' efforts to compete. After all, that is what would serve the ILECs' economic interest, and what has motivated their ceaseless efforts to obstruct enforcement of the UNE-related provisions of the Act from the day it was adopted. The ILECs have already paid scores of millions in fines for failing to meet their market-opening obligations under the Act. These fines, and not the ILECs' press releases, most accurately gauge the ILECs' commitment to local competition.

Recent market experience refutes the ILECs' rhetoric and proves that accepting the ILECs' recommendations would ensure the Act's failure. The Commission can now compare a local market, such as New York, where the Act's unbundling rules are being effectively enforced and facilities investment is high, with those in which enforcement has lagged. The data show that the availability of UNEs does not discourage either CLECs or ILECs from investing in facilities. AT&T's own market experience further confirms what Congress and this Commission previously thought would be true: the availability of UNEs promotes – and is a necessary precondition for – investment in facilities-based competition. Experience thus shows that the ILECs' approach will lead not to facilities-based local competition, but to no local competition.

The attached comments and supporting declarations set forth in detail the marketplace evidence that the Commission has said should guide its critical decision here. The Commission should focus first on the strong evidence that access to UNEs, including the UNE Platform (or UNE-P), is beneficial in itself. AT&T describes the substantial competitive benefits that

enforcement of the Commission's existing UNE rules has already produced in some places and that no other form of local competition, including cable telephony, can match. CLECs already serve almost as many residential customers through UNE-P in New York alone as all cable telephony providers serve nationwide. And in the face of Verizon's recently announced plans to raise local service rates in New York, New York consumers now have meaningful alternatives, such as AT&T's offer of a service package that provides local service with no price increases for the next year. Such price competition, along with the new product and feature packages that AT&T and other CLECs have introduced in New York, prove that UNE-P allows competitors to provide consumers valuable competitive benefits that this Commission should widely promote. Thus, quite apart from its effect on investment, UNE-based competition is beneficial in itself, and should be preserved and expanded for that reason alone, as NARUC has requested.

But that is not all, for the dispositive marketplace evidence is that access to UNEs promotes – and does not deter – increased facilities investment by CLECs and ILECs alike. AT&T's experience, in particular, confirms the Commission's prior findings that CLECs will deploy their own facilities as soon as it is economically and technically feasible to do so. The availability of UNEs at true TELRIC prices does not delay the deployment of facilities, because transaction costs and other competitive disadvantages of using UNEs mean that CLECs' real costs are far higher than the TELRIC rate. UNEs instead play a critical role in permitting CLECs to develop the customer base, traffic, and revenues needed to support facilities-investment.

AT&T has invested billions of dollars since 1996 to deploy more than 115 local switches in over 60 markets around the country, to re-engineer more than 200 long distance switches to provide local service, to establish over 1,000 collocations in ILEC switching offices, and to install more than 17,000 route miles of local fiber connecting customers in about 6,000 buildings

to its network. This extraordinary investment in network facilities alone belies any claim that AT&T lacks commitment to facilities-based competition. But the record also shows that AT&T's lack of access to UNEs – due to high prices and other restrictions – seriously impedes further facilities investment today. No company, including AT&T, can justify large investments in facilities when existing facilities are severely underutilized. Yet that is precisely the predicament AT&T and other facilities-based carriers now face. Regulatory restrictions that the Commission has placed on certain UNEs, together with high UNE prices and operational obstacles that CLECs face in gaining access to unbundled loops and other UNEs, prevent AT&T and other CLECs from obtaining the local traffic they need to fill existing facilities and support further investment.

Eliminating these restrictions and obstacles to the use of UNEs would directly promote greater investment in alternative facilities. AT&T's efforts to serve customers in low-volume business locations is a case in point. AT&T initially attempted to serve these customers using its own switches, which, in turn, required the ILECs to provision each new customer with a "hot cut" at the time of transfer from the ILEC to AT&T. This effort foundered, and ultimately was terminated, because hot cuts could not be provisioned in a timely, efficient, economic, and accurate manner. AT&T now uses UNE-P to transfer customers to AT&T, and later arranges a managed "project" cutover to its own switching when it is economic and technically feasible to do so. This approach has clearly advanced competition and customer choice. The availability of UNE-P has enabled AT&T to win and keep far more low-volume business customers than was possible before, and creates the opportunity to serve them with AT&T's own switches.

The availability of UNEs will also promote facilities-based service for residential customers. To serve residential customers, AT&T has invested billions of dollars in alternative

facilities (fixed wireless, cable, and now packet-switching) to avoid complete dependence on ILEC facilities. Yet fixed wireless has proven unsuccessful for both AT&T and other now-bankrupt carriers who pursued it, and cable telephony, while promising, has been pursued only in selected locales, and only as cable networks are gradually (and expensively) upgraded for that purpose. The continued availability of UNE-P is thus critical to AT&T's ability promptly to enter the residential market and build a customer base that could support switch-based provision of voice service in the future. For example, AT&T is now offering residential customers in New York a combined package of voice and DSL-based services using UNE-P and AT&T's own packet switching and associated network facilities. This service will ultimately allow AT&T to offer customers second and third "derived" voice lines through the packet-switched network at highly competitive prices. If AT&T can offer this service bundle successfully, it may also be able to justify serving customers in the same areas with switch-based voice-only service.

AT&T's market experience thus demonstrates that the availability of UNEs is critical to its ability to use its own facilities to provide local service. Indeed, the data confirm that facilities-investment is highest where UNEs are most available. For example, in New York the state commission long ago made clear its determination to foster UNE-based competition, and residential UNE-P competition has existed in New York since 1999; in California, by contrast, residential UNE-competition has been unavailable because of preclusively high UNE rates and inadequate operational support. Although New York is smaller than California, AT&T has deployed more switches (both in absolute terms, and on a per-line basis), extended fiber to more buildings, and is serving far more customers using its own switches, in New York than in California. The ILECs, for their part, understand that the threat of competition is far greater in states where UNE-P is available. As a result, the rate of *ILEC* investment in facilities also is

higher in the states with the highest levels of UNE-P entry – New York, Texas, and Georgia – than it is in comparable states where UNE-P competition has not yet been made practical, such as California, Massachusetts, and New Jersey.

The availability of UNEs is also essential to promote both CLEC and ILEC investment in broadband. Some ILECs have claimed that they will withhold further broadband investment unless they are relieved of the duty to provide competitors with unbundled access to the loop facilities that support broadband service. The Commission should see this threat for what it is: a calculated and cynical ploy designed to wall-off the very competition that is essential to spur investment in the equipment needed to provide DSL-based services. Indeed, the ILECs' voice monopolies provide a powerful *dis*incentive to broadband-related investments, for DSL-based services cannibalize the high-margin second-line services that the ILECs uniquely offer. Thus, as the Commission has recognized, the ILECs did not deploy the long-available technology to support DSL-based service until competition from cable providers and CLEC competitors made erosion of their second-line revenues inevitable. AT&T remains committed to facilities-based broadband competition, and has already acquired and deployed a substantial packet-switched network to provide that competition. But because AT&T and other competitors can neither replicate the last-mile loops that the ILECs control nor upgrade existing loop facilities to facilitate broadband service, unbundled access to those loops remains critical to promote competition and innovation from ILECs and CLECs alike.

In sum, the market experience of the last six years demonstrates that the fundamental tenets of the Act are sound. The Commission should build on the success achieved in New York and that is imminent in other states, and accelerate the progress toward competition in the future, by taking three critical steps to promote local competition and facilities-investment:

(1) *Retain the Existing National List of UNEs*: CLECs remain seriously impaired in their ability to offer local services without the UNEs on the existing national list. Access to unbundled loops remains critical in all but the rarest of circumstances, in which: a customer's need for very high capacity loops allows the CLEC to obtain economies of scale; local obstacles involving rights of way and building access can be successfully overcome; customers are willing to wait for the CLEC to construct such facilities; and the ILEC does not undercut the CLEC's efforts by simply adding new capacity through the use of additional loop electronics. Access to unbundled transport also remains vital, since alternatives to ILEC transport facilities are available on only a small fraction of routes that have the greatest concentration of traffic, and where necessary rights of way and collocation arrangements can be made efficiently. Access to unbundled switching, too, is equally critical, because obstacles to connecting a CLEC's own switch to an ILECs' unbundled loop (such as hot cuts and the increasing use of hard-wired DLC loops) are inherent in the ILECs' current network architecture.

In short, the circumstances that underlay the decisions in the Commission's *UNE Remand Order* have not changed, except for the deteriorating market conditions that now severely restrict CLECs' access to construction capital. Moreover, it is now clear that any changes to these circumstances in the future will occur only on a highly localized basis. Thus, the Commission should retain the existing national list of UNEs in order to give CLECs and capital markets the certainty they need to enable CLECs to execute their business plans, build their customer base, and generate revenues to support further facilities-investment. The Commission also should indicate that the future withdrawal of any particular UNE from the minimum national list will occur only with the concurrence of the state commission in the state where the "de-listing"

would occur, and only upon proof that alternatives to that UNE are currently available in sufficient quantities to meet the needs of multiple CLECs in the affected area.

(2) *Remove The Three Key Regulatory Restrictions On UNEs*: Actual market experience also demonstrates that the Commission's earlier efforts to place "granular" restrictions on the availability of UNEs have only impeded facilities-based competition. Access to UNEs is essential to provide CLECs with the traffic and revenue they need to fill existing facilities and justify further facilities-investment. Restrictions that make it harder for CLECs to serve customers only block further investment. This is true of each of the three major restrictions on the use of UNEs.

First, the Commission's use-restrictions and commingling-restrictions on existing loop-transport combinations ("EELs") mean that CLECs incur far higher costs than ILECs do to use the transmission facilities that connect the CLEC's customers to CLEC switches. These high costs substantially impair the CLECs' ability to use their own switching facilities to serve customers and contribute to the underutilization of existing CLEC switches. There is no legal justification for these restrictions. There is also overwhelming evidence from market experience that their continued application undermines the Commission's policy to promote facilities-based competition. The Commission should thus act swiftly to remove the restrictions on use of EELs.

Second, the Commission's three-line carve-out from unbundled switching is equally counterproductive. In practice, this arbitrarily constructed restriction serves only to insulate large numbers of low-volume business locations from facilities-based competition, since the evidence clearly demonstrates that CLECs cannot use unbundled switching to win those customers. That restriction has now been removed in New York, and this Commission should quickly eliminate this continuing obstacle to competition nationwide.

Third, the Commission's rules restrict CLECs from gaining access to so-called "next generation loop carrier" ("NGDLC") loops in central offices. This wholly unnecessary restriction prevents AT&T and other CLECs from offering DSL-based data and voice services using their own packet-switched networks, inhibits competition for both voice and data services, and undermines facilities-based competition for DSL-based services.

(3) *Promote Electronic Loop Provisioning*: In addition to enforcing current UNE rules and eliminating counterproductive restrictions, the Commission can accelerate the development of competition through parallel networks by adopting measures to stimulate deployment of electronic loop provisioning ("ELP"). ELP is analogous to the electronic "equal access" process that was decisive in the development of facilities-based long distance competition. The technology to support ELP is readily available today. Its deployment will eliminate the enormous obstacles to facilities-based competition that manual cutovers and DLC loops will otherwise continue to present.

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The stakes in this proceeding could not be higher. The record of the last six years vividly illustrates the inherent fragility of local competition. This proceeding may well be the Commission's last chance to calm capital markets and create the regulatory conditions that will allow AT&T and other competitors to provide business and residential consumers throughout the country with effective UNE-based competition that can expand, over time, to include facilities-based competition. Such a path is eminently feasible. Indeed, it is the very path that opened up the long distance market to the vibrant facilities-based competition that sprouted and

flourished from its non-facilities-based "roots" over the past three decades. It is folly for the ILECs to claim (or the Commission to believe) that the path to facilities-based local competition set out in the 1996 Act could be completed in a radically shorter timeframe or on a different basis, especially in the face of the ILECs' enormous advantages that no competitor can match.